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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In re

**GKPS, Inc.,**

Debtor.

Case No. 04-34670-tmb11

**DEFENDANTS SRIVASTAVA AND  
GADASALLI'S OPPOSITION TO  
MOTION FOR SUBSTANTIVE  
CONSOLIDATION**

Hearing Date: September 5, 2006

Hearing Time: 1:30 p.m.

Hearing Location: Courtroom 4

Defendants Sudhir P. Srivastava ("Srivastava") and Suresh N. Gadasalli ("Gadasalli")  
(together "Defendants") submit this opposition to the trustee's motion for substantive consolidation  
under 11 U.S.C. § 105(a) (the "Motion"). Defendants join the oppositions to the Motion filed by  
defendants Western National Bank ("WNB"), Kenneth Perry ("Perry") and Roberta Kale ("Kale").

**ARGUMENT**

With slight evidence, the trustees of GKPS, Inc. ("GKPS" or the "GKPS Estate") and the  
trustee of several limited liability companies known as the Symphony Healthcare entities

1 ("Symphony" or the "Symphony Estate") (together, the "Trustees") seek to obtain the equitable  
 2 and sparingly used remedy of substantive consolidation. The Motion should be denied because the  
 3 Trustees have failed to clear the high evidentiary bar required. The Trustees should be required to  
 4 prevail on the ambitious veil piercing and alter ego allegations they inserted in their respective  
 5 complaints through a full evidentiary process, rather than through the abbreviated process  
 6 contemplated by the Motion.

7 The Trustees seek to substantively consolidate their respective estates as well as two non-  
 8 debtor entities as follows: (1) consolidation of non-debtor Hospital and Surgical Center  
 9 Management Services, L.P. ("HSC") and the GKPS Estate, (2) consolidation of non-debtor  
 10 Symphony III, Inc. and the Symphony Estate, and (3) consolidation of the GKPS Estate and the  
 11 Symphony Estate.

12 Pursuant to *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 766 (9<sup>th</sup> Cir. 2000), the  
 13 central case relied on by the Trustees, the Ninth Circuit adopted the substantive consolidation test  
 14 articulated by the Second Circuit:

15 The Second Circuit has applied an independent test which requires the  
 16 consideration of two factors: "(1) whether creditors dealt with the entities  
 17 as a single economic unit and did not rely on their separate identity in  
 18 extending credit; or (2) whether the affairs of the debtor are so entangled  
 19 that consolidation will benefit all creditors." The presence of either factor  
 20 is a sufficient basis to order substantive consolidation. The first factor,  
 21 reliance on the separate credit of the entity, is based on the consideration  
 22 that lenders "structure their loans according to their expectations regarding  
 23  
 24  
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 26

1 assets for all the creditors” or where no accurate identification and  
2 allocation of assets is possible.

3 *Id.* (citations omitted).

4 The Trustees have failed to meet either factor of the *Bonham* test. As to the first factor,  
5 the Court has before it evidence that a significant and sophisticated creditor – WNB – dealt with  
6 HSC as a single, separate legal entity. WNB has submitted the declaration of Paul W. Lucas in  
7 opposition to the Motion. Mr. Lucas explains that WNB relied on the separate existence of HSC  
8 in advancing substantial unsecured credit to non-debtor HSC. The loan documents between  
9 WNB and HSC make this clear and expressly forbid HSC to merge or consolidate with any other  
10 entity. This response alone is sufficient to defeat the first factor of *Bonham*.

11 The Motion also fails to satisfy the second prong of the *Bonham* test. The Trustees argue  
12 that the affairs of GKPS, Symphony, HSC and Symphony III were “entangled.” However, the  
13 Trustees provide no concrete proof that entities acted as a single consolidated entity. The Motion  
14 is not supported by evidence that any entanglement that may be shown has resulted in hopelessly  
15 commingled assets or a situation in which no accurate identification and allocation of assets would  
16 be possible (*Bonham*, 229 F.3d at 766), as is required to under the second prong.

17 Substantive consolidation is an equitable remedy. It should not be used to gain an  
18 inequitable advantage in the two pending adversary proceedings commenced by the Trustees  
19 (Adversary Proceedings Nos. 06-03215-tmb and 06-03216-tmb). In those adversary proceedings,  
20 the Trustees assert multiple claims based primarily on alter-ego and fraudulent conveyance  
21 theories as well as preference and fraudulent conveyance claims that are very similar to grounds  
22 alleged for substantive consolidation. As WNB points out, the Trustees face jury trials and full  
23 discovery procedures in the adversary proceedings, something that would be short-circuited by the  
24 Motion.

25 Moreover, in the adversary proceedings, HSC has denied receiving any transfers from  
26 Symphony and has asserted the good faith defenses available to remote transferees under 11

1 U.S.C. § 550(b). If HSC is now substantively consolidated with the Symphony Estate, WNB's  
 2 "good faith" defenses in the adversary proceeding will be adversely affected or disappear entirely.

3 These are inequitable results, especially given the Trustees' present inability to satisfy the  
 4 *Bonham* requirements or prove a benefit to existing or newly created creditors. *See, e.g. Wells*  
 5 *Fargo Bank v. Sommers (In re AMCO Insurance)*, 444 F.3d 690, 697 n. 5 (5th Cir. 2006):

6 "it appears on the record before us that other remedies, such as the  
 7 doctrines of alter-ego and fraudulent conveyance, may have been  
 8 available, and appropriate under the circumstances, and the bankruptcy  
 9 court should duly make such considerations. Substantive consolidation  
 10 should not be used as a 'free pass' to spare [d]ebtors or any other group  
 11 from proving challenges, like fraudulent transfer claims, that are liberally  
 12 brandished to scare yet are hard to show. *Owens Corning*, 419 F.3d at  
 13 215. As the *Owens Corning* court noted, if the objectors to substantive  
 14 consolidation were as vulnerable to the fraudulent transfer challenges as  
 15 alleged, 'then the game should be played to the finish in that arena.'"

16 *In re Owens Corning*, a case in which the Third Circuit reversed the orders of the district  
 17 court and the bankruptcy court substantively consolidating the debtors' estates, provides a window  
 18 into the evidentiary seriousness that should accompany substantive consolidation. "Judge Fullam  
 19 reached his decision after a thirteen-day evidentiary hearing was held by Judge Wolin, and after  
 20 Judge Fullam reviewed 'the transcript of the testimony, and . . . the voluminous documentary  
 21 record compiled in the course of the hearing, and [had] the benefit of post-trial briefing and  
 22 argument.'" *In re Owens Corning*, 419 F.3d 195, 204 (3<sup>rd</sup> Cir. 2005) (quoting *In re Owens*  
 23 *Corning*, 316 B.R. 168, 169 (Bankr. D. De. 2004).

24 After this extensive factual and legal review, "Judge Fullam concluded  
 25 that there existed "substantial identity between . . . OCD and its wholly-  
 26 owned subsidiaries. He further determined that "there [was] simply no  
 basis for a finding that, in extending credit, the Banks relied upon the  
 separate credit of any of the subsidiary guarantors." In Judge Fullam's  
 view, it was "also clear that substantive consolidation would greatly  
 simplify and expedite the successful completion of this entire bankruptcy  
 proceeding. More importantly, it would be exceedingly difficult to  
 untangle the financial affairs of the various entities."

*Id.* at 202 (internal citations omitted).

1 The summary allegations made by the Trustees in these proceedings do not approach the  
2 showing necessary in the Ninth Circuit or any other circuit to justify substantive consolidation.  
3 The Trustees make no attempt to prove that substantive consolidation would benefit the creditors  
4 of Symphony Estate or the GKPS Estate, not to mention the creditors of the estates created by  
5 designating HSC and Symphony III debtors. The trustees have made no attempt to prove the likely  
6 distribution in the existing estates absent consolidation, nor have they attempted to prove how the  
7 likely distribution would change should through consolidation. The court thus has no idea whether  
8 or not the creditors of either estate will be better or worse off.

9 As pointed out by WNB, the Trustees lack sufficient information to determine who will  
10 benefit and who will lose as a result of the proposed consolidation.

11 The Ninth Circuit has stated that “[r]esort to consolidation ...should not be Pavlovian...but  
12 as almost every other court has noted, should be used ‘sparingly.’” *Bonham*, 229 F.3d at 767.  
13 Here, the Trustees have not met the prevailing test in the Ninth Circuit, they seek a short cut to  
14 avoid the full evidentiary and factual procedures required to impose this equitable remedy. The  
15 structure established for the entities involved was designed to be legally respected and was  
16 regarded as such by the Defendants. The structure was one commonly utilized in the business  
17 community and the Trustees have failed to provide a satisfactory basis for disregarding it.

#### 18 CONCLUSION

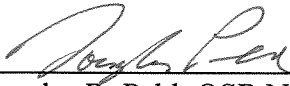
19 The Court should deny the present Motion. In the alternative, the Court should combine  
20 the Motion with the pending adversary proceedings and order that any decision on consolidation  
21 will be deferred until trial after a full opportunity for discovery and evidentiary presentation and  
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1  
2 review. If the Court decides to order substantive consolidation now, its order should expressly  
3 preserve all of Defendants' defenses as if no consolidation had occurred.

4 Respectfully submitted.

5 DATED: August 18, 2006.

6 **PERKINS COIE LLP**

7  
8 By   
9 Douglas R. Pahl, OSB No. 95047  
10 Of Attorneys for Sudhir P. Srivastava and Suresh N.  
11 Gadasalli  
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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing **DEFENDANTS SRIVASTAVA AND GADASALLI'S OPPOSITION TO MOTION FOR SUBSTANTIVE CONSOLIDATION** on:

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